

ESHB 2056 - S AMD 422
By Senator Roach

PULLED 04/23/2003

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** A new section is added to chapter 39.04 RCW
4 to read as follows:

5 When a municipality receives a written protest from a bidder for a
6 public works project which is the subject of competitive bids, the
7 municipality shall not execute a contract for the project with anyone
8 other than the protesting bidder without first providing at least two
9 full business days' written notice of the municipality's intent to
10 execute a contract for the project; provided that the protesting bidder
11 submits notice in writing of its protest no later than two full
12 business days following bid opening. Intermediate Saturdays, Sundays,
13 and legal holidays are not counted.

14 NEW SECTION. **Sec. 2.** A new section is added to chapter 39.04 RCW
15 to read as follows:

16 A low bidder on a public works project who claims error and fails
17 to enter into a contract is prohibited from bidding on the same project
18 if a second or subsequent call for bids is made for the project.

19 **Sec. 3.** RCW 39.10.020 and 2001 c 328 s 1 are each amended to read
20 as follows:

21 Unless the context clearly requires otherwise, the definitions in
22 this section apply throughout this chapter.

23 (1) "Alternative public works contracting procedure" means the
24 design-build and the general contractor/construction manager
25 contracting procedures authorized in RCW 39.10.051 and 39.10.061,
26 respectively.

27 (2) "Public body" means the state department of general
28 administration; the University of Washington; Washington State

1 University; every city with a population greater than seventy thousand
2 and any public authority chartered by such city under RCW 35.21.730
3 through 35.21.755 and specifically authorized as provided in RCW
4 39.10.120(4); every county with a population greater than four hundred
5 fifty thousand; every port district with total revenues greater than
6 fifteen million dollars per year; every public hospital district with
7 total revenues greater than fifteen million dollars per year utilizing
8 the design-build procedure authorized by RCW 39.10.051 and every public
9 hospital district, regardless of total revenues, proposing projects
10 that are considered and approved by the public hospital district
11 project review board under section 7 of this act; every public utility
12 district with revenues from energy sales greater than twenty-three
13 million dollars per year; and those school districts proposing projects
14 that are considered and approved by the school district project review
15 board under RCW 39.10.115.

16 (3) "Public works project" means any work for a public body within
17 the definition of the term public work in RCW 39.04.010.

18 **Sec. 4.** RCW 39.10.051 and 2002 c 46 s 1 are each amended to read
19 as follows:

20 (1) Notwithstanding any other provision of law, and after complying
21 with RCW 39.10.030, the following public bodies may utilize the design-
22 build procedure of public works contracting for public works projects
23 authorized under this section: The state department of general
24 administration; the University of Washington; Washington State
25 University; every city with a population greater than seventy thousand
26 and any public authority chartered by such city under RCW 35.21.730
27 through 35.21.755 and specifically authorized as provided in RCW
28 39.10.120(4); every county with a population greater than four hundred
29 fifty thousand; every public utility district with revenues from energy
30 sales greater than twenty-three million dollars per year; every public
31 hospital district with total revenues greater than fifteen million
32 dollars per year; and every port district with total revenues greater
33 than fifteen million dollars per year. The authority granted to port
34 districts in this section is in addition to and does not affect
35 existing contracting authority under RCW 53.08.120 and 53.08.130. For
36 the purposes of this section, "design-build procedure" means a contract

1 between a public body and another party in which the party agrees to
2 both design and build the facility, portion of the facility, or other
3 item specified in the contract.

4 (2) Public bodies authorized under this section may utilize the
5 design-build procedure for public works projects valued over ten
6 million dollars where:

7 (a) The construction activities or technologies to be used are
8 highly specialized and a design-build approach is critical in
9 developing the construction methodology or implementing the proposed
10 technology; or

11 (b) The project design is repetitive in nature and is an incidental
12 part of the installation or construction; or

13 (c) Regular interaction with and feedback from facilities users and
14 operators during design is not critical to an effective facility
15 design.

16 (3) Public bodies authorized under this section may also use the
17 design-build procedure for the following projects that meet the
18 criteria in subsection (2)(b) and (c) of this section:

19 (a) The construction or erection of preengineered metal buildings
20 or prefabricated modular buildings, regardless of cost; or

21 (b) The construction of new student housing projects valued over
22 five million dollars.

23 (4) Contracts for design-build services shall be awarded through a
24 competitive process utilizing public solicitation of proposals for
25 design-build services. The public body shall publish at least once in
26 a legal newspaper of general circulation published in or as near as
27 possible to that part of the county in which the public work will be
28 done, a notice of its request for proposals for design-build services
29 and the availability and location of the request for proposal
30 documents. The request for proposal documents shall include:

31 (a) A detailed description of the project including programmatic,
32 performance, and technical requirements and specifications, functional
33 and operational elements, minimum and maximum net and gross areas of
34 any building, and, at the discretion of the public body, preliminary
35 engineering and architectural drawings;

36 (b) The reasons for using the design-build procedure;

1 (c) A description of the qualifications to be required of the
2 proposer including, but not limited to, submission of the proposer's
3 accident prevention program;

4 (d) A description of the process the public body will use to
5 evaluate qualifications and proposals, including evaluation factors and
6 the relative weight of factors. Evaluation factors shall include, but
7 not be limited to: Proposal price; ability of professional personnel;
8 past performance on similar projects; ability to meet time and budget
9 requirements; ability to provide a performance and payment bond for the
10 project; recent, current, and projected work loads of the firm;
11 location; and the concept of the proposal;

12 (e) The form of the contract to be awarded;

13 (f) The amount to be paid to finalists submitting best and final
14 proposals who are not awarded a design-build contract; and

15 (g) Other information relevant to the project.

16 (5) The public body shall establish a committee to evaluate the
17 proposals based on the factors, weighting, and process identified in
18 the request for proposals. Based on its evaluation, the public body
19 shall select not fewer than three nor more than five finalists to
20 submit best and final proposals. The public body may, in its sole
21 discretion, reject all proposals. Design-build contracts shall be
22 awarded using the procedures in (a) or (b) of this subsection.

23 (a) Best and final proposals shall be evaluated and scored based on
24 the factors, weighting, and process identified in the initial request
25 for proposals. The public body may score the proposals using a system
26 that measures the quality and technical merits of the proposal on a
27 unit price basis. Final proposals may not be considered if the
28 proposal cost is greater than the maximum allowable construction cost
29 identified in the initial request for proposals. The public body shall
30 initiate negotiations with the firm submitting the highest scored best
31 and final proposal. If the public body is unable to execute a contract
32 with the firm submitting the highest scored best and final proposal,
33 negotiations with that firm may be suspended or terminated and the
34 public body may proceed to negotiate with the next highest scored firm.
35 Public bodies shall continue in accordance with this procedure until a
36 contract agreement is reached or the selection process is terminated.

1 (b) If the public body determines that all finalists are capable of
2 producing plans and specifications that adequately meet project
3 requirements, the public body may award the contract to the firm that
4 submits the responsive best and final proposal with the lowest price.

5 (6) The firm awarded the contract shall provide a performance and
6 payment bond for the contracted amount. The public body shall provide
7 appropriate honorarium payments to finalists submitting best and final
8 proposals who are not awarded a design-build contract. Honorarium
9 payments shall be sufficient to generate meaningful competition among
10 potential proposers on design-build projects.

11 **Sec. 5.** RCW 39.10.061 and 2002 c 46 s 2 are each amended to read
12 as follows:

13 (1) Notwithstanding any other provision of law, and after complying
14 with RCW 39.10.030, a public body may utilize the general
15 contractor/construction manager procedure of public works contracting
16 for public works projects authorized under subsection (2) of this
17 section. For the purposes of this section, "general
18 contractor/construction manager" means a firm with which a public body
19 has selected and negotiated a maximum allowable construction cost to be
20 guaranteed by the firm, after competitive selection through formal
21 advertisement and competitive bids, to provide services during the
22 design phase that may include life-cycle cost design considerations,
23 value engineering, scheduling, cost estimating, constructability,
24 alternative construction options for cost savings, and sequencing of
25 work, and to act as the construction manager and general contractor
26 during the construction phase.

27 (2) Except those school districts proposing projects that are
28 considered and approved by the school district project review board and
29 those public hospital districts proposing projects that are considered
30 and approved by the public hospital district project review board,
31 public bodies authorized under this section may utilize the general
32 contractor/construction manager procedure for public works projects
33 valued over ten million dollars where:

34 (a) Implementation of the project involves complex scheduling
35 requirements; or

1 (b) The project involves construction at an existing facility which
2 must continue to operate during construction; or

3 (c) The involvement of the general contractor/construction manager
4 during the design stage is critical to the success of the project.

5 (3) Public bodies should select general contractor/construction
6 managers early in the life of public works projects, and in most
7 situations no later than the completion of schematic design.

8 (4) Contracts for the services of a general contractor/construction
9 manager under this section shall be awarded through a competitive
10 process requiring the public solicitation of proposals for general
11 contractor/construction manager services. The public solicitation of
12 proposals shall include: A description of the project, including
13 programmatic, performance, and technical requirements and
14 specifications when available; the reasons for using the general
15 contractor/construction manager procedure; a description of the
16 qualifications to be required of the proposer, including submission of
17 the proposer's accident prevention program; a description of the
18 process the public body will use to evaluate qualifications and
19 proposals, including evaluation factors and the relative weight of
20 factors; the form of the contract to be awarded; the estimated maximum
21 allowable construction cost; and the bid instructions to be used by the
22 general contractor/construction manager finalists. Evaluation factors
23 shall include, but not be limited to: Ability of professional
24 personnel, past performance in negotiated and complex projects, and
25 ability to meet time and budget requirements; the scope of work the
26 general contractor/construction manager proposes to self-perform and
27 its ability to perform it; location; recent, current, and projected
28 work loads of the firm; and the concept of their proposal. A public
29 body shall establish a committee to evaluate the proposals. After the
30 committee has selected the most qualified finalists, these finalists
31 shall submit final proposals, including sealed bids for the percent
32 fee, which is the percentage amount to be earned by the general
33 contractor/construction manager as overhead and profit, on the
34 estimated maximum allowable construction cost and the fixed amount for
35 the detailed specified general conditions work. The public body shall
36 select the firm submitting the highest scored final proposal using the

1 evaluation factors and the relative weight of factors published in the
2 public solicitation of proposals.

3 (5) The maximum allowable construction cost may be negotiated
4 between the public body and the selected firm after the scope of the
5 project is adequately determined to establish a guaranteed contract
6 cost for which the general contractor/construction manager will provide
7 a performance and payment bond. The guaranteed contract cost includes
8 the fixed amount for the detailed specified general conditions work,
9 the negotiated maximum allowable construction cost, the percent fee on
10 the negotiated maximum allowable construction cost, and sales tax. If
11 the public body is unable to negotiate a satisfactory maximum allowable
12 construction cost with the firm selected that the public body
13 determines to be fair, reasonable, and within the available funds,
14 negotiations with that firm shall be formally terminated and the public
15 body shall negotiate with the next highest scored firm and continue
16 until an agreement is reached or the process is terminated. If the
17 maximum allowable construction cost varies more than fifteen percent
18 from the bid estimated maximum allowable construction cost due to
19 requested and approved changes in the scope by the public body, the
20 percent fee shall be renegotiated.

21 (6) All subcontract work shall be competitively bid with public bid
22 openings. When critical to the successful completion of a
23 subcontractor bid package and after publication of notice of intent to
24 determine bidder eligibility in a legal newspaper of general
25 circulation published in or as near as possible to that part of the
26 county in which the public work will be done at least twenty days
27 before requesting qualifications from interested subcontract bidders,
28 the owner and general contractor/construction manager may determine
29 subcontractor bidding eligibility using the following evaluation
30 criteria:

31 (a) Adequate financial resources or the ability to secure such
32 resources;

33 (b) History of successful completion of a contract of similar type
34 and scope;

35 (c) Project management and project supervision personnel with
36 experience on similar projects and the availability of such personnel
37 for the project;

1 (d) Current and projected workload and the impact the project will
2 have on the subcontractor's current and projected workload;

3 (e) Ability to accurately estimate the subcontract bid package
4 scope of work;

5 (f) Ability to meet subcontract bid package shop drawing and other
6 coordination procedures;

7 (g) Eligibility to receive an award under applicable laws and
8 regulations; and

9 (h) Ability to meet subcontract bid package scheduling
10 requirements.

11 The owner and general contractor/construction manager shall weigh
12 the evaluation criteria and determine a minimum acceptable score to be
13 considered an eligible subcontract bidder.

14 After publication of notice of intent to determine bidder
15 eligibility, subcontractors requesting eligibility shall be provided
16 the evaluation criteria and weighting to be used by the owner and
17 general contractor/construction manager to determine eligible
18 subcontract bidders. After the owner and general
19 contractor/construction manager determine eligible subcontract bidders,
20 subcontractors requesting eligibility shall be provided the results and
21 scoring of the subcontract bidder eligibility determination.

22 Subcontract bid packages shall be awarded to the responsible bidder
23 submitting the low responsive bid. The requirements of RCW 39.30.060
24 apply to each subcontract bid package. All subcontractors who bid work
25 over three hundred thousand dollars shall post a bid bond and all
26 subcontractors who are awarded a contract over three hundred thousand
27 dollars shall provide a performance and payment bond for their contract
28 amount. All other subcontractors shall provide a performance and
29 payment bond if required by the general contractor/construction
30 manager. If a general contractor/construction manager receives a
31 written protest from a subcontractor bidder, the general
32 contractor/construction manager shall not execute a contract for the
33 subcontract bid package with anyone other than the protesting bidder
34 without first providing at least two full business days' written notice
35 of the general contractor/construction manager's intent to execute a
36 contract for the subcontract bid package; provided that the protesting
37 bidder submits notice in writing of its protest no later than two full

1 business days following bid opening. Intermediate Saturdays, Sundays,
2 and legal holidays are not counted. A low bidder who claims error and
3 fails to enter into a contract is prohibited from bidding on the same
4 project if a second or subsequent call for bids is made for the
5 project. Except as provided for under subsection (7) of this section,
6 bidding on subcontract work by the general contractor/construction
7 manager or its subsidiaries is prohibited. The general
8 contractor/construction manager may negotiate with the low-responsive
9 bidder in accordance with RCW 39.10.080 or, if unsuccessful in such
10 negotiations, rebid.

11 (7) The general contractor/construction manager, or its
12 subsidiaries, may bid on subcontract work if:

13 (a) The work within the subcontract bid package is customarily
14 performed by the general contractor/construction manager;

15 (b) The bid opening is managed by the public body; and

16 (c) Notification of the general contractor/construction manager's
17 intention to bid is included in the public solicitation of bids for the
18 bid package.

19 In no event may the value of subcontract work performed by the
20 general contractor/construction manager exceed thirty percent of the
21 negotiated maximum allowable construction cost.

22 (8) A public body may include an incentive clause in any contract
23 awarded under this section for savings of either time or cost or both
24 from that originally negotiated. No incentives granted may exceed five
25 percent of the maximum allowable construction cost. If the project is
26 completed for less than the agreed upon maximum allowable construction
27 cost, any savings not otherwise negotiated as part of an incentive
28 clause shall accrue to the public body. If the project is completed
29 for more than the agreed upon maximum allowable construction cost,
30 excepting increases due to any contract change orders approved by the
31 public body, the additional cost shall be the responsibility of the
32 general contractor/construction manager.

33 NEW SECTION. Sec. 6. A new section is added to chapter 39.10 RCW
34 to read as follows:

35 (1) In addition to the projects authorized in RCW 39.10.061, public
36 hospital districts may also use the general contractor/construction

1 manager contracting procedure for the construction of public hospital
2 district capital demonstration projects, subject to the following
3 conditions:

4 (a) The project must receive approval from the public hospital
5 district project review board established under section 7 of this act.

6 (b) The public hospital district project review board may not
7 authorize more than ten demonstration projects valued between five and
8 ten million dollars.

9 (2) Public hospital districts may also use the general
10 contractor/construction manager contracting procedure for the
11 construction of any public hospital district capital project that has
12 a value over ten million dollars and that has received approval from
13 the public hospital district project review board established under
14 section 7 of this act.

15 NEW SECTION. **Sec. 7.** A new section is added to chapter 39.10 RCW
16 to read as follows:

17 (1) The public hospital district project review board is
18 established to review public hospital district proposals submitted by
19 public hospital districts to use alternative public works contracting
20 procedures. The board shall select and approve qualified projects
21 based upon an evaluation of the information submitted by the public
22 hospital district under subsection (2) of this section. Any
23 appointments for full terms or to fill a vacancy shall be made by the
24 governor and shall include the following representatives, each having
25 experience with public works or commercial construction: One
26 representative from the department of health; one representative from
27 the office of financial management; two representatives from the
28 construction industry, one of whom works for a construction company
29 with gross annual revenues of twenty million dollars or less; one
30 representative from the specialty contracting industry; one
31 representative from organized labor; one representative from the design
32 industry; one representative from a public body previously authorized
33 under this chapter to use an alternative public works contracting
34 procedure who has experience using such alternative contracting
35 procedures; one representative from public hospital districts with
36 total revenues greater than fifteen million dollars per year; and one

1 representative from public hospital districts with total revenues equal
2 to or less than fifteen million dollars per year. Each member shall be
3 appointed for a term of three years, with the first three-year term
4 commencing after July 27, 2003. Any member of the public hospital
5 district project review board who is directly affiliated with any
6 applicant before the board must recuse him or herself from
7 consideration of the application.

8 (2) A public hospital district seeking to use alternative
9 contracting procedures authorized under this chapter pursuant to
10 section 6 of this act shall file an application with the public
11 hospital district project review board. The application form shall
12 require the district to submit a detailed statement of the proposed
13 project, including the public hospital district's name; the current
14 projected total budget for the project, including the estimated
15 construction costs, costs for professional services, equipment and
16 furnishing costs, off-site costs, contract administration costs, and
17 other related project costs; the anticipated project design and
18 construction schedule; a summary of the public hospital district's
19 construction activity for the preceding six years; and an explanation
20 of why the public hospital district believes the use of an alternative
21 contracting procedure is in the public interest and why the public
22 hospital district is qualified to use an alternative contracting
23 procedure, including a summary of the relevant experience of the public
24 hospital district's management team. The applicant shall also provide
25 in a timely manner any other information concerning implementation of
26 projects under this chapter requested by the public hospital district
27 project review board to assist in its consideration.

28 (3) Any public hospital district whose application is approved by
29 the public hospital district project review board shall comply with the
30 public notification and review requirements in RCW 39.10.030.

31 (4) Any public hospital district whose application is approved by
32 the public hospital district project review board shall not use as an
33 evaluation factor whether a contractor submitting a bid for the
34 approved project has had prior general contractor/construction manager
35 procedure experience.

1 **Sec. 8.** RCW 39.10.902 and 2002 c 46 s 4 are each amended to read
2 as follows:

3 The following acts or parts of acts, as now existing or hereafter
4 amended, are each repealed, effective July 1, 2007:

- 5 (1) RCW 39.10.010 and 1994 c 132 s 1;
- 6 (2) RCW 39.10.020 and 2003 c ... s 3 (section 3 of this act), 2001
7 c 328 s 1, 2000 c 209 s 1, 1997 c 376 s 1, & 1994 c 132 s 2;
- 8 (3) RCW 39.10.030 and 1997 c 376 s 2 & 1994 c 132 s 3;
- 9 (4) RCW 39.10.040 and 1994 c 132 s 4;
- 10 (5) RCW 39.10.051 and 2003 c ... s 4 (section 4 of this act), 2002
11 c 46 s 1, & 2001 c 328 s 2;
- 12 (6) RCW 39.10.061 and 2003 c ... s 5 (section 5 of this act), 2002
13 c 46 s 2, & 2001 c 328 s 3;
- 14 (7) RCW 39.10.065 and 1997 c 376 s 5;
- 15 (8) RCW 39.10.067 and 2002 c 46 s 3 & 2000 c 209 s 3;
- 16 (9) RCW 39.10.070 and 1994 c 132 s 7;
- 17 (10) RCW 39.10.080 and 1994 c 132 s 8;
- 18 (11) RCW 39.10.090 and 1994 c 132 s 9;
- 19 (12) RCW 39.10.100 and 1994 c 132 s 10;
- 20 (13) RCW 39.10.115 and 2001 c 328 s 4 & 2000 c 209 s 4;
- 21 (14) RCW 39.10.900 and 1994 c 132 s 13; (~~and~~)
- 22 (15) RCW 39.10.901 and 1994 c 132 s 14;
- 23 (16) RCW 39.10.--- and 2003 c ... s 6 (section 6 of this act); and
- 24 (17) RCW 39.10.--- and 2003 c ... s 7 (section 7 of this act)."

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25 On page 1, line 1 of the title, after "bidding;" strike the
26 remainder of the title and insert "amending RCW 39.10.020, 39.10.051,
27 39.10.061, and 39.10.902; adding new sections to chapter 39.04 RCW; and
28 adding new sections to chapter 39.10 RCW."

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